SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-226

WILLIAM P. STARK and LERA H. STARK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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I. The government's brief in opposition to the granting of the writ attempts to distinguish the decision of the Fourth Circuit in *Rosen* v. *Commissioner*, 397 F.2d 245 by saying (M.3)

> "The critical ground of the decision was that the 'shares appear(ed) to be freely marketable' because 'the stock (was) held publicly and * * * listed on the American Stock Exchange.'"[1]

1. It may be noted that the memorandum misquotes the *Rosen* decision, the memorandum quoting the decision as though the Court was referring to the condition in 1961 at the time of the gift whereas the Court actually spoke in the present tense as of the time of the decision in 1968 as follows:

> "On the contrary, Gulf American shares appear... to be freely marketable—the stock *is* held publicly and *is* listed on the American Stock Exchange."

This attempted distinction ignores a presumption of marketability which applies equally to both the *Rosen* case and the case at bar. The tax is imposed and the right to the exclusion determined at the very moment of the gift. The valuation regulations assume that all property is marketable, the tax being based on its fair market value.

Both the shares of stock of W. P. Stark Lumber Company, Inc. in the present case and the Gulf American in the *Rosen* case were required to be valued under Reg. §25.2512-1 which assumes ready marketability at the value which is taxed, as follows:

> "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. Thus the value is generally to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property."

The two cases cannot be distinguished on the ground of relative marketability of the gift property. The conflict between the *Rosen* decision and the case at bar is that in *Rosen* a life estate in temporarily nonincome-producing property was valued and the statutory gift tax exclusions allowed, while in the case at bar under substantially identical circumstances the exclusions were denied.

II. In *Continental Illinois Nat'l Bank & Tr. Co. of Chicago* v. *U. S.*, 32 AFTR 2d ¶ 147,849, a case decided favorably to the taxpayers (and in agreement with petitioners here) on June 12, 1973, not previously cited by petitioners or the government, the District Court for the Northern District of Illinois (E.D.) approved use of tables for valuing a life estate and disregard of extrinsic evidence

of the life tenant's health, on the ground that use of the tables is required in order to eliminate uncertainty and speculation. The Court also emphatically endorsed the reasoning and conclusions of *Merchants National Bank of Topeka* v. *U. S.*, 32 AFTR 2d ¶ 147,825, cited on page 11 of the petition for writ herein.

Unless this Court issues its writ in this case, approval will have been given to an arbitrary action whereby the executive branch of the government will be permitted to insist that taxpayers follow long standing rules which the government, however, may with impunity elect to ignore or reject. Review by this Court is essential to avoid introduction of confusion and uncertainty into gift and estate tax valuation cases. Petitioners respectfully urge that their petition be granted.

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September, 1973